

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 09th FEBRUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 715/2017**

TELECOM WATCHDOG

..... Petitioner

Through: Mr. Prashant Bhushan with Mr.
Pranav Sachdeva, Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION Respondents

Through: Mr. Anupam S. Sharma, SPP, CBI
with Mr. Prakarsh Airan, Ms.
Harpreet Kalsi, Mr. Abhishek Batra,
Mr. Ripudaman Sharma, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant Writ Petition has been filed by the Petitioner herein which is a society working towards protecting the interests of consumers in the telecom sector, seeking for a direction to the Central Bureau of Investigation (*hereinafter referred to as 'the CBI'*) to investigate a complaint dated 11.03.2016 which has been sent by the Petitioner herein to the CBI alleging criminal conspiracy between some officials of Bharat Sanchar Nigam Ltd (*hereinafter referred to as 'the BSNL'*) & Chinese vendor M/S ZTE Telecom Ltd. in relation to a tender invited by the BSNL for Planning, Engineering, Supply, Installation, Testing, Commissioning and Annual Maintenance of 14.37 Million Lines for Phase-VII Expansion of GSM/UMTS Based Cellular Mobile Network in North, East & South Zones.

2. The gist of the allegation levelled by the Petitioner is that in October, 2011 BSNL invited tenders for 14.37 million GSM mobile telephone lines on turnkey basis for three zones, i.e. North, East & South Zones. The scope of the tender included planning, engineering, supply, installation, testing, commissioning and annual maintenance of these lines. It is alleged that the BSNL in its tender has prescribed eight milestones for releasing payment according to which only 50% payment was payable up to delivery stage, i.e. Milestones 1 to 3, and the balance payment was to be released in a phase wise manner in different stages on commissioning as per Milestones 4 to 8. The Petitioner has given a table delineating the milestones and the same is reproduced as under :

Milestone	Activities	Payment equipment	Payment Services
1	Supply to commence in 2 months	Only Custom Duty	Nil
2	Supply & commissioning of tools & testers in 3 months	Only Custom Duty	Nil
3	Supply of minimum 30% of ordered equipment in 4 months	50% (Less amount paid by BSNL as Custom Duty)	Nil
4	Installation, Integration, and Commissioning of all core in 6 months	Nil	Nil
5	Acceptance Testing of core; Supply of minimum 75% of ordered eqt; AT of 30% ordered in 7 months	60%	60%
6	Supply of minimum 100% of ordered eqt; AT of 60% ordered in 10 months	75%	75%
7	Acceptance Testing & clearing all pending technical issues in 12 months	90%	90%
8	After one year of commissioning or 80% loading, whichever is earlier	100%	100%

3. It is stated by the Petitioner that in the pre-bid stage various queries had been raised by the prospective bidder regarding the quantum of payment that could be released. The Petitioner herein has made a specific allegation that query No.1846 was for a clarification as to how the milestone payments against the surplus material handed over to BSNL shall be paid to the Vendor, for which a specific answer was received from the BSNL that the payment milestones shall be governed by purchase order conditions.

4. It is stated by the Petitioner that after bidding process, M/s. ZTE Private Ltd. (*hereinafter referred to as 'the M/s ZTE'*) emerged as a successful bidder for all the three zones. It is the allegation of the Petitioner that though the BSNL kept on procuring the material but M/s ZTE had not made the sites ready for installation which resulted in loss of a substantial quantity of material which was lying in the M/s ZTE storeroom. The allegation of the Petitioner is that M/s ZTE in connivance with the officers of the BSNL wanted payments to be released for the material without the BSNL taking physical possession of the equipment. According to the Petitioner, the payments were being released without the milestones having being achieved by M/s ZTE. It is stated that in order to ensure that the payments were made before the achievement of milestones, fictitious query No.59 was prepared and a clarification was sought as to how the milestone payments against the surplus material handed over to BSNL shall be paid to the Vendor and for this query a fictitious response was secured stating that 90% of the cost of the surplus material handed over at the warehouse will be paid upon submission of documents as per Section-V-B clause 10.1.6 and balance 10% will be payable as per milestone-8 of Section-V-B, clause 10.

It is the allegation of the Petitioner that original query No.59 was entirely different and was related to entirely different subject.

5. It is stated that a specific complaint was made by the Petitioner to the CBI *vide* letter dated 11.03.2016 highlighting the connivance between the officials of BSNL and M/s ZTE regarding excess payments being made to M/s ZTE without milestones being achieved by them. It is stated that not being satisfied with the reply given by the CBI, the Petitioner has approached this Court by filing the instant Writ Petition.

6. Notice was issued by this Court on 25.01.2017. Counters have been filed. A supplementary affidavit has been filed by the Petitioner during the pendency of the Writ Petition providing additional information. It is stated in the supplementary affidavit that cash is being generated by M/s ZTE through M/s Trimax IT and Infrastructure Ltd. It is stated in the supplementary affidavit that the money raised through M/s Trimax IT and Infrastructure Ltd. is being routed to the BSNL officials. It is stated in the supplementary affidavit that despite being made aware that cash is being generated by M/s ZTE by raising fake bills and the money so raised is being routed back to the BSNL employees, the CBI has done precious little.

7. Three Status Reports dated 28.01.2019, 27.01.2020 & 11.01.2023 have been filed by the CBI in a sealed cover stating the result of the investigation conducted by the CBI. It is stated that a Preliminary Enquiry had been initiated by the CBI and as per the Status Report dated 11.01.2023 the CBI has closed the Preliminary Enquiry with the following recommendations:

“i) RDA Major against Shri Anupam Srivastava, the then CMD, BSNL as Head of Management Committee of BSNL for making modification in the payment

milestone without deliberating upon the efforts to acquire the sites as well as resulting into financial loss and technical degradation by having the add-on work contract with M/s. M/S ZTE at the rate of year 2011.

ii) Departmental Action, as deemed fit, for the officers of BSNL for formulating improper tenders and lack of planning before issuing of Purchase Orders.

iii) Self Contained Note be sent to Enforcement Directorate as well as Income Tax Department for dubious payment of Rs. 5.25 crores for taking necessary action regarding transaction between M/s M/S ZTE and M/s M/s Trimax IT and Infrastructure Ltd. IT and infrastructure Ltd.

(iv) Self Contained Note be sent to CVO, BSNL for systemic improvement and issuance of adequate guidelines with regard to procurement of material as surfaced during enquiry of this case.”

8. Mr. Prashant Bhushan, learned Counsel for the Petitioner, contends that the CBI has acted in complete contravention of the judgment passed by the Bench of five Judges of the Apex Court in Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1. According to Mr. Bhushan, registration of FIR is mandatory if the information discloses commission of a cognizable offence and no Preliminary Enquiry is permissible in such a situation. He submits that the said judgment mandates that Preliminary Enquiry is to be conducted only if information received does not disclose commission of a cognizable offence and the Enquiry is limited to ascertain as to whether a cognizable offence is made out or not. Mr. Bhushan further states that the said judgment mandates that if the inquiry discloses the commission of a cognizable offence, an FIR must be registered and in cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be

supplied to the first informant and it must describe the reasons, in brief, for closing the complaint and not proceeding further. Mr. Bhusan contends that the CBI has violated the judgment of the Apex Court in Lalita Kumari (supra) by not registering an FIR in spite of the complaint disclosing the commission of cognizable offence.

9. Per contra, Mr. Anupam S. Sharma, learned SPP for the CBI, contends that on receipt of the complaint a Preliminary Enquiry was undertaken and investigation has been conducted by the CBI in accordance with the CBI Manual 2020 (*hereinafter referred to as 'the CBI Manual'*). He states that after investigation it was found that there was no material to proceed further and a closure report has been filed giving certain recommendations.

10. Heard Mr. Prashant Bhusan, learned Counsel appearing for the Petitioner, and Mr. Anupam S. Sharma, learned SPP for the CBI, and perused the material on record.

11. Chapter 7 of the CBI Manual 2020 deals with Preliminary Enquiries. Clause 7.1 and 7.2 of the same reads as under:

“7.1 When, a complaint is received or information is available which may, after verification as enjoined in this Manual, indicate serious misconduct on the part of a public servant but is not adequate to justify registration of a regular case under the provisions of Section 154 Cr.P.C., a Preliminary Enquiry may be registered after obtaining approval of the Competent Authority. Further if the information received does not disclose a cognizable offence but indicates the necessity for an enquiry, a preliminary enquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. A PE may be converted into RC as soon as sufficient material becomes available to show

that Prima Facie there has been commission of a cognizable offence.

When information available is adequate to indicate commission of cognizable offence or its discreet verification leads to similar conclusion, a Regular Case must be registered instead of a Preliminary Enquiry. When the verification of a complaint or source information reveals commission of a prima facie cognizable offence, a Regular Case is to be registered as enjoined by law. It is, therefore, necessary that the Head of the Branch must carefully analyse the material available at the time of evaluation of the verification report submitted by the Verifying Officer, so that registration of PE is not resorted to where a Regular Case can be registered.

Where material or information available clearly indicates that it would be a case of misconduct and not criminal misconduct, it would be appropriate that the matter is referred to the Competent Authority in the department at that stage itself by sending a self-contained note signed by the Head of Branch and forwarded by the Head of Zone. In such cases, no 'Preliminary Enquiry' need be registered. Sometimes the Hon'ble High Courts and Hon'ble Supreme Court also entrust matters to Central Bureau of Investigation for enquiry and submission of report. In such situations also, a 'Preliminary Enquiry' may be registered after obtaining orders from the Head Office.

7.2 *While proposing registration of a Preliminary Enquiry pertaining to the abuse of official position by a public servant in the matter of business/ commercial decision, the important difference between a business risk and a bona fide conduct should be kept in mind with a view to ensure that while corrupt public servants are suitably dealt with, the bona fide business/commercial decisions taken by public*

servants in discharge of their official duties are not unnecessarily taken up for probe."

12. Clause 7.15 of the CBI Manual 2020 provides that after Preliminary Enquiry is conducted, it will result either in a registration of Regular Case or in a recommendation for Departmental Action against the public servant, or be referred to the department through a self-contained note for such action as may be deemed fit by the department, or being closed for want of proof. The Manual also provides that in deciding whether a Preliminary Enquiry should be convened into Regular Case or not, the Head of Branch should take into consideration whether it is necessary to do so for other processes of law required in aid of investigation or whether there is possibility of making out a Court case by further investigation. If only departmental enquiry is the likely outcome then it might be considered whether the enquiries can be completed in the Preliminary Enquiry itself without converting into Regular Case. The Manual further provides that the Head of Branch must personally satisfy himself that it is necessary and justifiable to convert a Preliminary Enquiry into Regular Case and, therefore, he should exercise due care and caution in such conversion and avoid hasty or premature action in this regard.

13. On notice being issued by this Court, a Preliminary Enquiry was registered by the CBI. The CBI has filed three Status Reports. In the first Status Report dated 28.01.2019, it has been stated that during investigation it has been found that ongoing query No.59 relates to Power Management System. However, when BSNL reissued the tender on 18.10.2011 fresh 358 queries were received in which query No.59 was present and which relates to unused inventory. CBI, therefore, concluded that the query mentioned in

the Management Committee Report, which is claimed to be fictitious by the Petitioner herein is, in fact, not fictitious. It is to be noted that in the supplementary affidavit also the Petitioner has also stated that query No.59 is not fictitious. Probably, the Petitioner had become aware of the fact that this query did exist in those 358 queries that were received in pursuance to the re-issue tender dated 18.10.2011. The Status Report further reveals that investigation in respect of the allegations made by the Petitioner in the supplementary affidavit regarding creation of fictitious bill for routing payments to the officials of BSNL continued further.

14. The second Status Report dated 27.01.2020 reveals that investigation continued further to establish any link between the bills raised by M/s Trimax IT and Infrastructure Ltd., payments made by M/s ZTE to M/s Trimax IT and Infrastructure Ltd. and routing of these funds to the officials of BSNL. The Status Report reveals that witnesses of BSNL were examined but no link could be established that the amount received by the M/s Trimax IT and Infrastructure Ltd. from M/s ZTE was used as bribe to the officials of BSNL.

15. The latest Status Report has been filed on 11.01.2023. In this Status Report also, it is stated by the CBI that though money had been received by M/s Trimax IT and Infrastructure Ltd. from M/s ZTE but no link has been established that the money received by M/s Trimax IT and Infrastructure Ltd. was used in bribing the officials of BSNL. The Status Report, however, suggests that Departmental Enquiry must be initiated against Shri Anupam Srivastava, the then CMD, BSNL as Head of Management Committee of BSNL for making modification in the payment milestone without deliberating upon the efforts to acquire the sites which resulted into financial

loss and technical degradation by having the add-on work contract with M/s ZTE at the rate of year 2011. The Status Report further suggests that departmental action, if found necessary, be taken against the officers of BSNL for formulating improper tenders and lack of planning before issuing of Purchase Orders. The Status Report further suggests that Self Contained Note be sent to Enforcement Directorate as well as Income Tax Department for dubious payment of Rs. 5.25 crores and for taking necessary action regarding transaction between M/s ZTE and M/s Trimax IT and Infrastructure Ltd and a Self Contained Note be sent to CVO, BSNL for systemic improvement and issuance of adequate guidelines with regard to procurement of material as surfaced during enquiry of this case.

16. The Preliminary Enquiry has been registered by the CBI at the instance of this Court and the CBI, after concluding the investigation has filed Status Reports before this Court. On a perusal of the Status Reports, this Court does not find any reason to discard the Status Reports filed by the CBI and pass any further directions. This Court, however, directs the BSNL to initiate departmental action, as suggested by the CBI, against its officers. It is made clear that this Court has not expressed any opinion on the merits of the imputations of allegations on the officers of BSNL. Any action initiated by the BSNL be taken to its logical conclusion on its own merits. As directed by the Apex Court in Latika Kumari (supra), CBI is directed to supply a copy of the entry of the closure to the Petitioner disclosing the reasons, in brief, for closing the complaint and not proceeding further. Liberty is granted to the Petitioner to take recourse to the legal remedies in accordance with law.

17. With these observations, the instant Writ Petition is disposed of, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

FEBRUARY 09, 2023

Rahul



मत्स्यमेव जयते